UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	)	MDL No. 14-2551 (SRN/BRT)
This Document Relates to: ALL ACTIONS	)	

DEFENDANT NATIONAL HOCKEY LEAGUE'S MOTION FOR LEAVE TO FILE MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

At the May 12, 2017 status conference, the Court requested that the NHL move for leave to file its pending summary judgment motion, which seeks dismissal of the claims brought by plaintiffs Leeman and Nicholls as time-barred. Specifically, the Court asked the NHL to explain why: (1) it was proper to bring the motion prior to class certification; and (2) the motion does not pertain to the adequacy of Nicholls and Leeman as class representatives under Fed. R. Civ. P. 23(a)(4) such that it "should have been included in the briefing on class certification." (May 12, 2017 Tr. 25:10-14.)

As set forth below, the Federal Rules of Civil Procedure, countless courts and leading treatises all make clear that a defendant may move for summary judgment prior to class certification. As these authorities explain, a defendant has the prerogative to seek judgment as to individual named plaintiffs instead of filing a motion for summary judgment after certification that would bind an entire class. Moreover, ruling on a summary judgment motion before class certification is particularly appropriate where, as here, the named plaintiffs do not contend that they would be prejudiced by the order in which the Court decides the motions. Indeed, the only prejudice posed is to the NHL, which would be substantially harmed if two class representatives with untimely claims were permitted to shield their claims from scrutiny by joining them with the claims of other plaintiffs and seeking class certification. The Rules Enabling Act and due process forbid such a use of procedural devices to effectively alter substantive rights.

As to the Court's second inquiry, and contrary to plaintiffs' suggestion, the NHL's summary judgment motion did not advance adequacy arguments in disguise. Adequacy arguments focus on how a named plaintiff's claims would be received by the jury if a

class trial were held, while the NHL's motion seeks to prevent Leeman and Nicholls from ever putting their claims before a jury, regardless of whether a class is certified. Moreover, to the extent limitations issues are relevant to class certification in this litigation, the NHL believes they raise predominance – rather than adequacy – concerns. Notably, the NHL ***did*** advance that argument in its opposition to class certification, and that argument stands on its own, independent of the summary judgment motion. In any event, the limitations issues here would not achieve anything as adequacy arguments because they only address two of the named plaintiffs (one of whom is merely proposed as a class representative in the alternative). Thus, they would not independently support the denial of class certification.

For all of these reasons, the NHL respectfully requests that the Court allow it to file its motion for summary judgment.

ARGUMENT

I. IT IS PROPER FOR A DEFENDANT TO MOVE FOR SUMMARY JUDGMENT ON THE NAMED PLAINTIFFS' CLAIMS BEFORE CLASS CERTIFICATION IS DECIDED.

It is well settled that a defendant "may move for a summary judgment prior to the class certification." 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1798 (3d ed. 2005); *Manual for Complex Litigation* (Fourth) § 21.133 (2004) ("The court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification; however, such rulings bind only the named parties."). While Rule 23(c)(1) instructs that "[t]he class certification decision is to be made 'at an early practicable time,'" that formulation does not mandate that it

must be made before dispositive motions. *Newberg on Class Actions* § 7:10 (5th ed.) (quoting Fed. R. Civ. P. 23(c)(1)(A)). To the contrary, as the U.S. Court of Appeals for the Eighth Circuit has acknowledged, Rule 23's advisory committee notes specifically "permit summary judgment rulings before class certification." *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 896 (8th Cir. 2014). Indeed, the advisory committee notes explicitly state that one consideration that "'may affect the timing of the certification decision'" is if "'[t]he party opposing the class . . . prefer[s] to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified.'" *Id.* (quoting Fed. R. Civ. P. 23(c)(1)(A) advisory committee's note to 2003 amendment); *see Manual for Complex Litigation* (Fourth) § 21.133 ("Most courts agree, and Rule 23(c)(1)(A) reflects, that such precertification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment.").

Consistent with these principles, the Eighth Circuit and many other federal courts have expressly endorsed the practice of ruling on summary judgment before ruling on class certification. *Toben*, 751 F.3d at 896 (collecting authorities); *see also Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1207 (10th Cir. 2015) ("Specifically, the problem for Ms. Ellis is her failure to attach any legal significance to the fact that the Company's motion for summary judgment predates her motion for class certification – *viz.*, she has presented no convincing argument that the district court was somehow constrained to rule on the class-certification motion *before* the summary-judgment motion. We submit that

she cannot make this showing because no such obligation existed."); *Cowen v. Bank United of Tex., FSB*, 70 F.3d 937, 941-42 (7th Cir. 1995) (observing that a defendant "may be content to oppose the members of the class one by one, as it were, by moving for summary judgment, every time he is sued, before the judge presiding over the suit decides whether to certify it as a class action"); *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 367 (D. Minn. 2013) (acknowledging that courts generally decide class certification motions before dispositive motions, but recognizing that "defendants may have a right to waive the protections of this general rule and seek a ruling on the merits of putative class claims prior to class certification").

This Court should do the same. When the NHL originally moved to dismiss all of the plaintiffs' claims as time-barred, the Court held that it could not be "determined from the face of the Master Complaint when Plaintiffs' causes of action accrued" because accrual could be delayed until plaintiffs knew or should have known that prior head trauma could pose an "increased risk of developing neurodegenerative disorders." (Mem. Op. & Order at 9, 14, 15, MDL ECF No. 126.) In light of the Court's ruling, the parties engaged in substantial discovery leading up to class certification, much of which related to limitations issues. That discovery revealed that Leeman and Nicholls were aware of their alleged injuries ***and*** the risks underlying their claims more than three years before they filed suit. Indeed, by 2010, they had each submitted workers' compensation claims based on their belief that they were at risk for long-term neurological injury, evincing both an awareness of alleged present injury and a belief that NHL play was the cause. Based on this evidence, the NHL perceived easily identifiable and "fatal flaws in

plaintiffs' claims," *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92 (D.C. Cir. 2001), and has sought "a ruling on the merits" of the two named plaintiffs' claims prior to class certification, *Hartley*, 295 F.R.D. at 367.

All parties would benefit from a resolution of these issues now rather than later. If the motion is granted, the parties will not have to expend further resources litigating meritless claims. Moreover, the ruling would provide helpful guidance in evaluating the timeliness of other plaintiffs' claims in this MDL proceeding.

Importantly, plaintiffs do not "suggest any prejudice to their own interests." *Curtin*, 275 F.3d at 93. At most, plaintiffs argue that the summary judgment motion amounts to an attack on the named plaintiffs' adequacy as class representatives that should have been included in the NHL's opposition to class certification. (May 12, 2017 Tr. 12:4-6.) This position would significantly prejudice the NHL by allowing plaintiffs to shield the named plaintiffs' claims from scrutiny solely by joining a bid for class certification with other plaintiffs who may not have the same flaws. If a class were certified, plaintiffs presumably would rely on that fact to argue that the Court should not entertain further motions directed at individual class members, thereby enabling two plaintiffs with stale claims to go along for the ride with other class members. That is a wholly improper use of the class action device because it would effectively alter the substantive rights of these plaintiffs in violation of the Rules Enabling Act and due process. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (commanding that Rule 23 not be interpreted to "abridge, enlarge or modify any substantive right" and specifically admonishing that "a class cannot be certified on the premise that [the

defendant] will not be entitled to litigate its . . . defenses to individual claims") (quoting 28 U.S.C. § 2072(b)); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (noting that due process requires an opportunity to present every available defense).

In sum, the NHL's motion for summary judgment is appropriately timed because the merits of these plaintiffs' claims can be readily resolved as a matter of law, and plaintiffs have not been prejudiced by the timing of the NHL's motion.

II. THE NHL'S ARGUMENTS ARE NOT RELATED TO THE "ADEQUACY" OF PLAINTIFFS LEEMAN AND NICHOLLS AS CLASS REPRESENTATIVES.

Because the motion for summary judgment seeks a ***dispositive*** ruling on the merits of Leeman's and Nicholls's claims, it does not pertain to the adequacy of these plaintiffs as class representatives and could not have "been included in the briefing on class certification." (*See* May 12, 2017 Tr. 25:10-14.)

First, the NHL's motion does not raise an adequacy issue. The adequacy prong of Rule 23 is concerned with how a proposed class representative's claims would play out ***in front of a jury***, specifically whether the named plaintiff's claims will divert the jury from class issues because he or she presents "unique" issues at trial that are not relevant to the rest of the class. *See, e.g.*, *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999); *CE Design Ltd. v. King Architectural Metals, Inc*., 637 F.3d 721, 726 (7th Cir. 2011) ("A named plaintiff who has serious credibility problems or who is likely to devote too much attention to rebutting an individual defense may not be an adequate class representative"; "'[t]he fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest

of the class will suffer.'") (citation omitted); *Woodard v. Tower Auto. Prods. Co.*, No. 00 C 50459, 2002 WL 832572, at *1, *3 (N.D. Ill. May 1, 2002) (evaluating adequacy by determining whether "[e]ach of the proposed class representatives, based on the evidence in the record at this point, has a weak or atypical case," and specifically stating that it was "important to note that the court [was] not determining that the plaintiffs could not eventually prove" their claims). Here, by contrast, the NHL's motion takes no position on whether litigation of Leeman's or Nicholls's claims would adversely affect the class at trial because their claims would not play well before a jury; it simply argues that those claims should never reach a jury at all, because they fail as a matter of law.

Second, a ruling on these named plaintiffs' adequacy would not adjudicate the limitations issue. As other courts have recognized, "there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion under Rule 23 into a . . . Rule 56 motion for summary judgment by allowing the district judge to evaluate the possible merit of the plaintiff's claims." *Tchoboian v. Parking Concepts, Inc.*, No. SACV 09-422 JVS (ANx), 2009 WL 2169883, at *4 (C.D. Cal. July 16, 2009) ("[T]o determine [the defendant's] liability in this case . . . would improperly convert this motion into . . . a motion for summary judgment."). That is because "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194-95 (2013). Accordingly, "[w]hen a district court properly considers an issue overlapping the merits in the course of determining whether a Rule 23 requirement is met, ***it does not do so in order to predict which party will prevail on the merits***." *In re Hydrogen Peroxide Antitrust Litig.*, 552

F.3d 305, 317 n.17 (3d Cir. 2008) (emphasis added); Fed. R. Civ. P. 23(c)(1)(A) advisory committee's note to 2003 amendment ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision."). Rather, the court only "determine[s] whether the alleged claims can be properly resolved as a class action." *In re Hydrogen Peroxide*, 552 F.3d at 317 n.17 (citation omitted); *Tchoboian*, 2009 WL 2169883, at *4 (explaining that it would be unfair to render a ruling as to liability until "both parties have had the opportunity to fully address the question" and cite to additional evidence that the court may not have in front of it through the class certification briefing alone). The distinction between a plaintiff's failure to advance a valid claim and a plaintiff's failure to prove that certification of a class action is appropriate, *Tchoboian*, 2009 WL 2169883, at *4, dispels plaintiffs' characterization of the NHL's motion as nothing more than an "adequacy challenge" (May 12, 2017 Tr. 12:2-4).

Third, plaintiffs' suggestion that the NHL's motion for summary judgment is a means of advancing an additional class certification argument while avoiding the Court's word limitations makes no sense because the NHL did, in fact, raise and devote substantial space to statute-of-limitations issues in its brief opposing class certification. (*See* Def.'s Class Certification Opp'n at 77-78, MDL ECF No. 787.) Consistent with courts that have invoked a similar analysis, the NHL explained that limitations issues would spur mini-trials for each class member, defeating Rule 23's predominance requirement. *See, e.g.*, *In re Express Scripts, Inc.*, No. 4:05MD01672HEA, 2015 WL 128073, at *6-7 (E.D. Mo. Jan. 8, 2015) ("the individual issues that are involved in determining whether . . . the statute of limitations apply to each and every plaintiff" can

be "***staggering***" because they "turn in large part on each class member's knowledge and conduct") (emphasis added) (citation omitted); *Johnson v. Kan. City S. Ry. Co*., 208 F. App'x 292, 296-97 (5th Cir. 2006) (finding that "plaintiffs' individual issues," particularly whether the statute of limitations barred their claims, "predominate over the common ones").

In its briefing, the NHL made clear that determining whether each proposed class member's claim is time-barred will turn on personalized inquiries concerning: (1) which state's statute of limitations applies to each player's claim; (2) when each player allegedly sustained the head hit that increased his risk of long-term injury; (3) when each player began experiencing the symptoms of the physical injuries of which he now complains; and (4) when he became aware of the alleged potential for long-term injury. (Def.'s Class Certification Opp'n at 77-78, MDL ECF No. 787.) In addition, the NHL included some of the most salient evidence concerning the accrual of Nicholls's and Leeman's claims – including the "shot that changed [Leeman's] life" in 1988 and Nicholls's filing of a workers' compensation lawsuit in 2010 to recover for the injuries he alleges here – as examples of the kind of player-specific evidence that would come into play in order to determine whether any individual player's claim is time-barred. (*Id*. at 78.) None of the additional evidence and argument included in the NHL's motion for summary judgment was necessary to make that point. Rather, the NHL's briefing on class certification is complete and stands alone, regardless of whether the summary judgment motion is considered at this time. As such, there is no basis to conclude that

the motion for summary judgment was an end-run around the Court's class certification word limits.[1]

Finally, it would have been illogical for the NHL to raise an adequacy challenge based on the arguments in its motion for summary judgment because Leeman and Nicholls are only two of six named plaintiffs in this litigation – and neither of them is being proffered as the sole representative for any proposed class. To the contrary, Leeman is one of two proposed representatives for the personal injury class members in putative Class 2, while Nicholls is merely offered as an alternate representative for putative Class 1 if the Court does not accept plaintiffs' proposal to apply an amalgam of New York and Minnesota law to the entire class. (*See* Pls.' Mem. in Supp. of Mot. for Class Certification at 29, 64-65, 69, MDL ECF No. 640.) Therefore, even if the Court found that Leeman and Nicholls were inadequate representatives because their claims were potentially untimely, each class would still have a remaining named representative. For this reason too, it would not have been logical for the NHL to mount an adequacy argument with respect to these two plaintiffs in opposition to class certification.

In sum, the NHL's motion for summary judgment is appropriately timed and could not have been incorporated into its briefing on class certification. As such, the NHL

[1] The NHL has not obtained (and has in no way attempted to obtain) any unfair litigation advantage by filing a summary judgment motion along with its opposition to class certification because plaintiffs would be entitled to respond to the summary judgment motion without having to sacrifice words that they were planning to devote to their reply in support of their motion for class certification.

respectfully requests that the Court allow it to file its motion for summary judgment.[2]

CONCLUSION

For the foregoing reasons, the NHL respectfully requests that the Court grant leave to file its motion for summary judgment.

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Respectfully submitted,

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[2] At the May 12, 2017 status conference, plaintiffs' counsel urged that the NHL failed to comply with Rule 56(a) because, according to counsel, that rule "applies to claims or defenses," whereas the NHL's motion "is directed at specific Plaintiffs." (May 12, 2017 Tr. 11:23-12:3.) But Rule 56(a) only states that "[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." Fed. R. Civ. P. 56(a). That is precisely what the NHL did by moving on the ***claims*** of Leeman and Nicholls. (*See, e.g.*, Def.'s Mem. in Supp. of Mot. for Summ. J. at 1-2, 27, *Leeman* ECF No. 65 (arguing that Leeman's and Nicholls's "***claims*** are barred as a matter of law" and requesting that "the Court . . . grant the NHL's motion for summary judgment and dismiss Leeman's and Nicholls's ***claims***") (emphases added).) The fact that the motion was "directed" at the claims of "specific," and not all, plaintiffs makes no difference. The language of Rule 56(a) does not limit summary judgment motions to those that would dispose of an entire action, and courts have readily granted summary judgment as to some plaintiffs' claims while leaving others intact. *See, e.g.*, *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620, 627 (S.D.N.Y. 2010) (granting defendants' motion for partial summary judgment seeking dismissal of claims of certain investors – but not all – in putative class action against investment bank); *Ludwig v. City of Jamestown, N.Y.*, No. 05-CV-353(A), 2009 WL 483164, at *5 (W.D.N.Y. Feb. 25, 2009) (defendants moved for summary judgment against three of four plaintiffs and court granted motion with respect to two of them); *Smith v. Carey Canadian Mines, Ltd.*, 609 F. Supp. 639, 640-41 (E.D. Pa. 1985) (granting summary judgment as to the wrongful death claims of "fourteen of the plaintiffs" and the survival claims "of all plaintiffs except" two).

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